Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reallocation and Service Rules	)	GN Docket No. 01-74
for the 698-746 MHz Spectrum	)	
Band (Television Channels 52-59)	)	

To: The Commission

OPPOSITION OF COUNCIL TREE COMMUNICATIONS, LLC TO PETITION FOR CLARIFICATION OR RECONSIDERATION OF THE SPECTRUM CLEARING ALLIANCE

Council Tree Communications, LLC ("Council Tree") hereby submits its opposition to the Petition for Clarification or Reconsideration submitted by Paxson Communications Corporation ("Paxson") on behalf of the Spectrum Clearing Alliance in the above-referenced proceeding.[1]

Council Tree is an investment company organized to develop telecommunications industry partnerships for the benefit of minority-owned and female-owned investors. Council Tree is working with several small businesses to develop partnerships which will participate in both the 747-792 MHz ("Upper 700 Band") and 698-746 MHz ("Lower 700 Band") spectrum auctions. Accordingly, Council Tree has an interest in the rules and polices which govern the implementation and operation of new services in this spectrum.

On January 18, 2002, the Commission released a Report and Order adopting allocation and service rules for the 48 MHz of spectrum currently occupied by television channels 52-59.[2]

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[1] "Petition for Clarification or Reconsideration of the Spectrum Clearing Alliance" submitted on February 5, 2002 ("Paxson Petition").

[2] *Reallocation and Service Rules of the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, FCC 01-364, GN Docket No. 01-74 (rel. January 18, 2002) ("Lower 700 MHz Order").

In that Report and Order, the Commission stated that it intends to prohibit the initiation of any new analog broadcast operations on channels 52-59 during the spectrum transition and in the future. Specifically, the Order dismissed pending petitions for new NTSC channel allotments on channels 52-59 and required applicants with pending applications for analog construction permits either to amend their applications to specify core television channels or initiate only digital service in the Lower 700 Band.[3] The Commission stated that it was taking these actions because "we do not believe that adding analog allotments or stations in the 698-746 MHz band would be consistent with the purpose of [the Balanced Budget] Act nor would it foster the timely and efficient transition to digital television."[4] The Commission further stated that deploying service in the analog format is not consistent with its statutory mandate to reclaim this spectrum for new services.[5]

Paxson seeks clarification or reconsideration of the Commission's decision prohibiting new analog operations in the Lower 700 Band to allow analog stations currently operating on channels 60-69 to relocate their analog facilities to the Lower 700 Band in connection with voluntary band-clearing agreements. Paxson states that the Commission previously determined that it would allow broadcasters on channels 60-69 who enter into such agreements to relocate temporarily to channels 52-58 and that the Lower 700 MHz Order is inconsistent with the Commission's previous determination. Therefore, Paxson requests that the Commission clarify that it did not intend to alter its previous determination. Alternatively, Paxson asserts that if the Commission did intend to prohibit analog stations participating in band-clearing agreements

[3] Lower 700 MHz Order at paras. 44-45.

[4] Id. at para. 44.

[5] Id. at para. 45.

from moving to the Lower 700 Band, the Commission should reconsider this position on the grounds that Paxson lacked notice and the opportunity to comment on this rule change.

Contrary to Paxson's request, the Commission should clarify that it did intend to prohibit new analog TV service in the Lower 700 Band, including stations relocating from channels 60-69 pursuant to band-clearing agreements. The Commission provided sufficient notice of its intention to prohibit all new analog service in the Lower 700 Band to allow parties to comment on its proposal, and Paxson had ample opportunity to address its channel 60-69 band-clearing related concerns during the proceeding. Moreover, sound policy reasons support a prohibition of all new analog broadcast service in the Lower 700 Band. Accordingly, the Commission should affirm its decision and deny Paxson's Petition.

I. THE COMMISSION'S DECISION TO PROHIBIT ALL NEW BROADCAST STATIONS ON CHANNELS 52-58 COMPLIED WITH THE ADMINISTRATIVE PROCEDURE ACT.

Paxson asserts that the Commission's decision to prohibit TV stations from temporarily relocating analog facilities to channels 52-58 was arbitrary and capricious. Paxson argues that the Commission had agreed to permit such relocation in the Third Report and Order of the Upper 700 Band proceeding;[6] that the Commission failed to give adequate notice and opportunity to comment on its proposed change of this policy in the Lower 700 MHz NPRM;[7] and that the Commission failed to explain adequately its reversal of the policy. Therefore, Paxson urges that if the Commission really intends to prohibit broadcasters operating on channels 60-69 who agree

[6] *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules; Carriage of the Transmissions of Digital Television Broadcast Stations; Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Third Report and Order, 16 FCC Rcd 2703 (2001) ("Third Report and Order").

[7] *Reallocation and Service Rules of the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Notice of Proposed Rulemaking, FCC 01-91, GN Docket No. 01-74 (rel. March 28, 2001) ("Lower 700 MHz NPRM").

to relocate pursuant to band-clearing agreements from initiating new analog service on channels 52-58, the Commission should reconsider its decision.

Paxson claims that the Commission's decision to prohibit band-clearing TV stations from utilizing channels 52-58 temporarily is a complete reversal of previous Commission policy. In support of this claim, Paxson details the history of the Upper 700 Band reallocation proceeding, emphasizing the Commission's duty to ensure that channels 60-69 are cleared promptly. However, Paxson ignores the fact that the Commission did not guarantee these stations that they would be able to relocate to the Lower 700 Band; in fact, the Commission stated only that it would not prohibit such relocation and would review any relocation request on a case-by-case basis under the standards previously set forth in the Upper 700 Band proceeding.[8] Agreeing to consider a request is far from creating a right to secure the object of the request itself. Despite Paxson's assertions to the contrary, the Commission's recent decision to prohibit new analog operations on channels 52-58 is not a major reversal of Commission policy.

Paxson also complains that it did not have adequate notice and opportunity to comment on what it characterizes as the Commission's change in policy. Paxson asserts that the Lower 700 MHz NPRM does not give specific notice of the Commission's consideration of a policy change and that the Lower 700 MHz Order does not provide an adequate explanation for the change. Paxson is wrong on both counts.

First, it is a well-established administrative law principle that "an agency may issue rules that do not exactly coincide with the proposed rule, so long as the final rule is a 'logical outgrowth' of the proposed rule."[9] Indeed, the courts repeatedly have held that additional notice and comment are unnecessary where the rule proposed is a logical outgrowth of a proposal for

[8] Third Report and Order, 16 FCC Rcd 2703 at 2718.

[9] Fertilizer Institute v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

which adequate notice and opportunity to be heard have been provided.[10] The courts have held that a final rule will not be deemed a logical outgrowth if "a new round of notice an comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule."[11]

In the instant rulemaking proceeding, all parties, including Paxson, had notice that the Commission was considering transition issues for operations in the Lower 700 Band and how it could "further the viability of auction of this spectrum . . . ."[12] The Commission specifically recognized that continued processing of analog applications could result in making new service operations more difficult.[13] Moreover, the Commission acknowledged that the last filing window for new analog service applications closed on September 20, 1996, and it asked for input on the ultimate treatment of the remaining applicants for such stations.[14] The Commission asked whether, "if such applications are granted . . . could [we] require these stations to transition to available frequencies below 698 MHz by a date certain. . . . [and] whether applicants . . . should be allowed to amend their pending applications . . . to specify a new digital channel . . . ."[15]

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[10] E.g., Hodge v. Dalton, 107 F.3d 705 (1997) (stating a final regulation that varies from the proposal, even substantially, will be valid as long as it is in character with the original proposal and a logical outgrowth of the notice and comments); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983) (holding that final administrative rules that depart from an agency's initial proposals do not require new notice and comment if the final rules are a logical outgrowth of the proposals such that the parties should have anticipated they might be imposed).

[11] First American Discount Corp. v. Commodity Futures Trading Commission, 222 F.3d 1008, 1004 (D.C. Cir. 2000).

[12] Lower 700 MHz NPRM at para. 20.

[13] Id. at para. 24

[14] Id. at paras. 22-24.

[15] Id.

Accordingly, Paxson was on notice that the Commission was contemplating transition service rules for new analog stations in the Lower 700 Band.

Second, though Paxson claims that the Lower 700 MHz Order does not adequately support the Commission's policy change of prohibiting all new analog stations in the band, the Commission made clear in that Order that (a) processing new analog applications at this stage of the digital television transition would be inconsistent with the transition process because the construction of the stations might be much later in the transition process and (b) "this approach will avoid the complications that could arise in requiring licensees to convert their analog operations to digital relatively soon after they commence analog operations."[16] These findings adequately support the Commission's decision to prohibit new analog operations, including stations seeking to move from channels 60-69. Indeed, these findings make clear the Commission's desire for a smooth transition to new services and its desire to speed the DTV transition to completion – both sound policy goals.

Thus, the Commission's decision to prohibit all new analog broadcast operations on channels 52-58 was based on adequate notice and opportunity for comment, and the Commission adequately articulated the basis for its decision. Therefore, the Commission complied with Sections 553(b) and (c) of the Administrative Procedure Act.

II. THE COMMISSION'S DECISION TO PROHIBIT NEW ANALOG STATIONS IN THE LOWER 700 BAND IS CORRECT.

The Commission's decision also was well-founded on substantive grounds. Strong policy reasons support the Commission's stated intention to prohibit all new analog broadcast service in the Lower 700 Band. As the Commission previously recognized, a significant degree of broadcast incumbency poses considerable challenge to the provision of viable new

commercial services prior to the end of the DTV transition.[17] As investors planning to participate in auctions for the Upper And Lower 700 Bands, Council Tree and its partners have a vested interest in obtaining spectrum encumbered by as few television stations as possible in order to develop and implement a viable business plan. As the Commission recognized, the Lower 700 Band spectrum is extremely encumbered by current analog and digital television facilities.[18] Because this spectrum is so encumbered, new entrants may be prevented indefinitely from implementing plans to utilize it. Allowing additional analog stations in the Lower 700 Band will make it that much more difficult for investors such as Council Tree to initiate new service.[19] Therefore, the Commission's decision to prohibit all new analog service in the Lower 700 Band reflects sound spectrum policy.

Further, allowing broadcasters currently operating on channels 60-69 to relocate to channels 52-58 may allow these broadcasters to reap windfalls of double payments in their relocation to the core channels. In the Upper 700 MHz Band, the Commission is allowing voluntary agreements between incumbent broadcasters and future licensees to clear this spectrum rapidly. The Commission has indicated that as part of this policy it will allow payments to broadcasters to further their rapid exit from channels 60-69. However, allowing broadcasters exiting channels 60-69 to migrate to channels 52-58 could produce a scenario

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(..continued)

[16] Lower 700 MHz Order at paras 44-45.

[17] Lower 700 MHz NPRM at para. 20.

[18] Id. at para. 21.

[19] Paxson asserts that allowing broadcasters operating on channels 60-69 to relocate to channels 52-58 will not increase the number of stations to be cleared from channels 52-69 by the end of the DTV transition. Paxson clearly overlooks the benefits that will be achieved in creating certainty for investors in the Lower 700 Band regarding the total number of broadcast stations they must account for in developing a business plan. The addition of an unanticipated new analog broadcast station may completely destroy a sound business plan and delay the introduction of new service significantly.

which allows these same broadcasters to receive *further* payment to vacate channels 52-58.[20] For example, Council Tree may be involved in a band-clearing agreement in the Upper 700 Band which results in a significant payment to the broadcaster to relocate. If that broadcaster then relocates to channel 54 (a Lower 700 Band frequency), another new entrant seeking to use the Lower 700 MHz Band frequency will suffer delay in its service plans or be forced to pay the broadcaster compensation to relocate to a core television channel. By merely stopping on an interim channel in the Lower 700 Band, a broadcaster can increase the likelihood of receiving an additional payment for its agreement to allow new entrants to use the spectrum. That would not be sound Commission policy.

III. THE COMMISSION SHOULD REJECT PAXSON'S CHANNEL 59 PROPOSAL.

Paxson, in a Supplement to its Petition, raises a new issue, regarding Channel 59. Paxson asks that the Commission reconsider its decision to auction and license the spectrum now designated as TV Channel 59 on an MSA/RSA basis. Paxson wants that spectrum auctioned and licensed on a larger, EAG basis instead.

Paxson's only argument for this change is that it would facilitate band clearing agreements in the Upper 700 Band. Paxson asserts: (1) that "to operate on Channel 60 without interference from broadcast stations, wireless operators need to clear Channel 59" and (2) the Commission's band plan "fails to take into account the increased difficulty of clearing Channel 59 created by licensing the spectrum on an MSA/RSA basis."

Unfortunately, Paxson's real motive for this proposal is to enrich itself. Paxson admits as much, by positing that "the small and rural wireless operators the Commission expects to bid for

[20] The Commission stated it will allow payments to broadcasters operating on channels 52-58 who agree to exit the spectrum early on a case-by-case basis. Lower 700 MHz Order at para. 184.

these licenses may not have sufficient resources to adequately compensate incumbent broadcasters for vacating Channel 59."

The Commission has allocated most of the Lower 700 Band on the larger, EAG basis, but assigned a 12-MHz block of the band on an MSA/RSA basis, "to promote opportunities for a wide variety of applicants, including small and rural wireless providers, to obtain spectrum." Lower 700 MHz Order at para. 95. The Commission stated that this "is consistent with our congressional mandate to promote 'economic opportunity and competition' and to disseminate licenses 'among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.'" Id. Paxson's self-serving, economic argument to change this Commission determination must be seen for what it is; the Commission should reject Paxson's late proposal and affirm the designation of Channel 59 for auction and operation on an MSA/RSA basis.

Indeed, the Commission stated in the Lower 700 MHz Order (at para. 94) that the "vast majority of commenters recommend using much smaller geographic areas . . . ." But the Commission, taking into account several policy goals, determined that "a combination of large and small geographic service areas best accomplishes these goals." Potential bidders now can make plans and adopt strategies based on the availability of both categories of spectrum. To change this now, just so broadcasters such as Paxson can reap more benefits in band clearing agreements, is contrary to the public interest.

WHEREFORE, for the foregoing reasons, the Commission should deny the Paxson Petition and confirm its decision to prohibit analog TV stations in the Upper 700 Band from migrating to the Lower 700 Band temporarily.

Respectfully submitted,

COUNCIL TREE COMMUNICATIONS, LLC

By: /s/ Steve C. Hillard

Steve C. Hillard
COUNCIL TREE COMMUNICATIONS, LLC
2919 West 17th Avenue
Suite 211
Longmont, CO 80503
(303) 678-1844

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CERTIFICATE OF SERVICE

I, Elizabeth Hammond, certify that a true and correct copy of the foregoing "Opposition Of Council Tree Communications, LLC To Petition For Clarification Or Reconsideration Of The Spectrum Clearing Alliance" has been mailed first-class, postage prepaid mail this 14th day of March to the following:

William L. Watson
Vice President
Paxson Communications Corporation
601 Clearwater Park Road
West Palm Beach, Florida 33401

/s/ Elizabeth Hammond
Elizabeth Hammond